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September 30, 2010

Mr. Corbin Davis
Supreme Court Clerk
PO Box 30052
Lansing, MI 48909

RE: ADM File No. 2010-16
Proposed Amendment of Rules 6.302 and 6.610

Dear Mr. Davis,

I write in regards to the two alternatives which have been proposed in the wake of *Padilla v Kentucky*, 130 S Ct 1473 (2010). In *Padilla*, the Supreme Court held that defense counsel is required to inform the defendant about the risk of deportation as a potential consequence of a guilty plea.

Alternative A

The State Appellate Defender Office opposes Alternative A because it necessitates an inquiry into a defendant's immigration status. Such an inquiry could lead to one of two equally problematic results for defendants with immigration concerns. First, since such persons will be wary of divulging their status on the public record, they could respond by misstating their status out of fear of the consequences. Second, if a defendant admits to being in the country illegally, they could be exposed to the risk of adverse consequences, where ordinarily it would not have been part of the guilty plea process. Guilty pleas are one manner to resolve criminal charges. They should not serve to help implement deportation or removal proceedings.

Alternative A is also potentially misleading because it limits the risk of deportation to a conviction. In reality, any admission a defendant makes, regardless of whether an adjudication of guilt follows could result in deportation.

Finally, SADO opposes any inquiry that may intrude upon the confidential communications between counsel and the defendant. The purpose of the rule is not to police the conduct of defense attorneys or invade the province of their relationships with their clients. Indeed, *Padilla* focused on the obligation of defense attorneys, not the obligation of the courts. By imposing an active inquiry by the judge, Alternative A shifts the burden from defense attorneys, contrary to *Padilla*.

Alternative B

SADO instead supports adoption of Alternative B. By requiring a court to provide advice regardless of the defendant's actual immigration status, this alternative responds to *Padilla* without inviting any of the problems presented by the first alternative.

Alternative B is superior because the language describing the potential consequences is more expansive and specific. Specifically, the rule requires the court to advise that a plea by a noncitizen may result not only in deportation, but also exclusion from [re-]admission or denial of naturalization. These are potential immigration consequences which an unwitting defendant might not contemplate if only mindful of the deportation consequence.

Finally, this alternative provides for an opportunity for reflection after the advice is rendered, but before the plea is actually entered. This practice means that defendants will not be able to claim that they did not have time or process to properly understand potential deportation consequences.

Response to Justice Markman concurrence

Justice Markman's concern that adding standard advice to all guilty pleas would constitute "an enormous waste of time and resources" is a legitimate fear, well worth considering. However, based on the experience of SADO attorneys in reviewing thousands of plea transcripts, the disruption offered by an extra paragraph of advice would be minimal. In contrast, actually inquiring of a defendant or their attorney of immigration status, as anticipated by Alternative A would significantly increase inefficiency by creating an additional fact-finding hearing as part of a guilty plea process.

Justice Markman is correct that *Padilla* concerns deportation whereas Proposal B also includes "exclusion of admission" and "naturalization." There is no reason though that simply because *Padilla* involved deportation, this Court should not recognize other serious immigration consequences. The *Padilla* opinion cites the "intimately related" nature of deportation and the criminal process, the "automatic result" of deportation, and the "succinct, clear, and explicit" character of the penalty as factors implicating deportation. 130 S Ct at 1481-1483. These factors could also apply to these other immigration consequences.

Finally, SADO agrees with Justice Markman, that *Padilla* focuses on the lawyer's duty to properly advise a client rather than a court's responsibility. However, these rule proposals in part are designed to limit future litigation aimed at plea withdrawal based on *Padilla*. The best solution then would be one that allows the court to reinforce counsel's presumed advice without interfering with attorney-client communication, or potentially allowing the judge to supplant counsel's advice with a hearing.

Proposed Alternative

Although SADO supports Proposal B, we believe that the purpose of *Padilla* and the interests of justice would be better served if the amendment were placed in the section of the rule which governs the intelligence of the plea, before the factual basis is established.

To that end, I would suggest amending Paragraph B rather than Paragraph E of the rule, and adding the following provision as a new subparagraph 6, as follows:

- (B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:
 - (6) that a plea of guilty or nolo contendere by a non citizen may result in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement.

SADO urges this approach because once the defendant has made admissions in order to establish the factual basis for the plea, it is already too late to avoid potential adverse consequences. Deportation is easily based not only on actual conviction for an offense, but simply on factual admissions establishing commission of the offense, with no adjudication of guilt.

MCR 6.610

Alternative B also includes amendments to MCR 6.610, governing the plea procedure in district court, where defendants sometimes are not represented by counsel. SADO supports the enactment of this rule, for all of the reasons offered in the above discussion of Alternative B. SADO's support for this rule is based on our understanding that this advice is rendered in district court before the defendant makes any admissions in order to establish the factual basis for the plea.

SADO does offer one additional proposal here. The existing rule permits entry of the plea based on a written record and without the defendant's personal appearance, under specified circumstances. In order to ensure that the advice concerning immigration consequences is rendered under these circumstances, I would urge amending this subparagraph of the rule as follows:

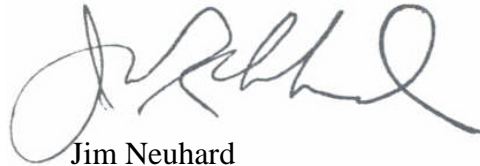
(7) A plea of guilty or nolo contendere in writing is permissible without a personal appearance by the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if

(c) the defendant acknowledged in writing that he/she is aware that a noncitizen who offers a plea of guilty or nolo contendere risks deportation, exclusion from readmission to the United States or denial of naturalization under the laws of the United States.

This additional change will ensure that those whose pleas are entered in absentia are also aware of potential immigration consequences if they are noncitizens.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jim Neuhard', with a large, stylized initial 'J' and a long, sweeping horizontal stroke at the end.

Jim Neuhard
Director
State Appellate Defender Office